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ABSTRACT

The legal aspects of four issues concerned with obtaining educational services for children (ages 3 through 5) with disabilities are outlined and analyzed in this paper. Each issue is discussed in terms of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, and/or the Americans with Disabilities Act (ADA), as appropriate. The issues addressed are: (1) eligibility and entitlement; (2) transition from Early Intervention Services for Infants and Toddlers (under Part H of IDEA) to Free Appropriate Public Education (under Part B of IDEA); (3) the meaning of the term "appropriateness" for 3-to-5 year olds; and (4) the definition of "least restrictive environment" for 3-to-5 year olds. (Contains extensive footnotes and in-text citations of the pertinent laws.) (DB)

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OBTAINING APPROPRIATE EDUCATIONAL SERVICES FOR THREE THROUGH FIVE YEAR OLD CHILDREN WITH DISABILITIES:

An Outline of Selected Legal Issues

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by Eileen Ordover

I. Eligibility and Entitlement

A. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 *et seq.*

1. As of July 1, 1991, states must provide all eligible 3-to-5 five year olds (inclusive) with disabilities with a free appropriate public education, or loose all IDEA funds for children in this age group. 20 U.S.C. §1419(b).[1]

2. "Eligible" 3-to-5 year olds are those who have one of the categorical disabilities listed in IDEA and need special education and related services as a result. See 20 U.S.C. §1401(a)(1). At a state's discretion, also eligible are 3-to-5 year olds who are "(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in...physical development, cognitive development, communication development, social or emotional development, or adaptive development; and (ii) who, by reason thereof need special education and related services." 20 U.S.C. §1401(a)(1) as amended by §3 of the Individuals with Disabilities Education Act Amendments of 1991, Pub. L. 102-119 (October 7, 1991).

3. Services must be in place, and actually begin, by the child's third birthday. The use of a cutoff date by which a child must be three years old in order to receive services during a particular school year violates 20 U.S.C. §1419(b)(1). See J. Schrag, U.S. Dept. of Education/Office of Special Education (OSEP) Policy Memorandum 90-16, May 8, 1990, reprinted in 1 ECLPR [Early Childhood Law and Policy Reporter] ¶11; see also *Inquiry of Harris*, 1 ECLPR ¶123 (OSEP, 2/11/91); *Inquiry of Neveldine*, 1 ECLPR ¶124.

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[1] A state statute that limits the entitlement of 3-to-5 year olds to fiscal years for which specific funds are appropriated does *not* fulfill this requirement; in order to avoid loss of IDEA funds for preschoolers, a state with such legislation *must* each year appropriate sufficient funds to provide a free appropriate public education to all 3-5 year olds. Inquiry of Harris, 1 ECLPR [Early Childhood Law and Policy Reporter] ¶123 (OSEP [U.S. Dept. of Ed./Office of Special Education Programs] 2/11/91).

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4. Once a state serves 3-to-5 five year olds, IDEA's substantive and procedural requirements apply just as they do to older children with disabilities. 34 C.F.R. §300.300(b)(4). Each eligible preschool child is thus entitled to special education and related services specially designed to meet his or her unique needs, 20 U.S.C. §§1412(1), 1414(a), 1401(a)(16)-(18), reasonably calculated to enable him or her to make meaningful educational progress, *Board of Education v. Rowley*, 458 U.S. 176 (1982), in the least restrictive environment. 20 U.S.C. §1412(5)(B); 34 C.F.R. §300.550.

5. Under certain circumstances, school systems may provide 3-to-5 year olds with an Individualized Family Service Plan (IFSP) instead of an Individualized Education Program (IEP). 20 U.S.C. §1414(a)(5) as amended by §6 of Pub. L. 102-119. Substitution of an IFSP for an IEP must be consistent with state policy, and must be agreed to by the parents. *Id.* IFSPs for 3-to-5 year olds must meet the requirements governing IFSPs under the early intervention program for infants and toddlers (birth through age 2) with disabilities created by Part H of IDEA, 20 U.S.C. §1471 *et seq.* See 20 U.S.C. §1414(a)(5).[2]

B. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794

1. A state or school system that operates a preschool education program "may not, on the basis of handicap, exclude qualified handicapped persons from the program...and shall take into account the needs of such persons in determining the aid, benefits and services to be provided under the program or activity." 34 C.F.R. §104.38. In addition, preschool programs may not engage in the discriminatory practices banned by 34 C.F.R. §104.4(b).[3]

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[2] These requirements include a statement of the child's current levels of physical, cognitive, communication, social or emotional, and adaptive development; a statement of the family's resources, priorities and concerns regarding enhancement of the child's development; a statement of the specific early intervention services needed to meet the unique needs of the child and family (including the frequency, intensity and method of service delivery); a description of the natural environments in which services will be appropriately provided; a statement of the major outcomes expected to be achieved, including the methods to be used for assessing progress and determining whether services or goals need to be revised; the starting dates and expected duration of each service; the name of the case manager responsible for implementing and coordinating the plan; and the steps to be taken to transition the child to special education services under Part B of IDEA if such services are appropriate. 20 U.S.C. §1477(a)(d) as amended by Pub. L. 102-119, §14. Early intervention services available under the Part H early intervention program include family training, counseling and home visits; special instruction; speech pathology and audiology; occupational and physical therapy; psychological services; case management services; medical services for diagnosis or evaluation; early identification, screening and assessment services; social work services; vision services; assistive technology devices and assistive technology services; transportation; and health services necessary to enable the child to benefit from the early intervention programming. See 20 U.S.C. §1472(2) as amended by Pub. L. 102-119, §14.

[3] These include denying a "qualified handicapped person" the opportunity to participate in or benefit from an aid, benefit or service; affording an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded others; providing an aid, benefit or service that is not as effective as that provided to others; providing different or separate aid, benefits or services to individuals with disabilities or to any class of individuals with disabilities unless such action is necessary to provide

2. The §504 regulations regarding rights to appropriate education, related services, transportation, residential placement, 34 C.F.R. §104.33; evaluation and placement rights and procedures, 34 C.F.R. §104.35; and procedural safeguards, 34 C.F.R. §104.36, on their face apply only to recipients that operate "elementary or secondary" programs, and do not create an independent right to preschool services. Preschool programs are treated separately in §104.38, which does not contain comparable requirements.

a. Children who are eligible for services under IDEA can assert comparable rights under IDEA and its implementing regulations.

b. Children who are *not* eligible under IDEA but *do* fall within the broader §504 definition of a protected "individual with handicaps"[4] *and* live in jurisdictions that provide preschool programs for children without disabilities (as well as for IDEA-eligible children) may be able to utilize 34 C.F.R. §§104.3(k)(2) and 104.4 to achieve similar results. 34 C.F.R. §104.3(k)(2) provides that for purposes of public preschool services, a "qualified handicapped person" means, *inter alia*, "...a handicapped person (i) of an age during which nonhandicapped persons are provided such services..." Children within the §504 definition would thus be qualified to participate in, and be protected against exclusion or other discrimination in the public preschool program regardless of IDEA eligibility. Once in, they would be further protected by 34 C.F.R. §104.4(b)(1), which prohibits affording a "qualified handicapped person" with an aid, benefit or service that is not equal to that afforded others; providing an aid, benefit or service that is not as effective as that afforded others; and providing different aid, benefits or services to any class of "handicapped persons" unless such action is necessary to provide "qualified handicapped persons" with aid, benefits or services that are as effective as those provided to others. 34 C.F.R. §104.4(b)(1)(ii)-(iv). Arguably, providing one class of three-to-five year old children with disabilities in the public preschool program, i.e. those whose disabilities trigger IDEA eligibility, with specialized instruction, related services, evaluations, etc. and denying the same to children with other kinds of disabilities violates these prohibitions.

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qualified individuals with disabilities with aid, benefits, or services that are as effective as those provided to others; or otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service. See 34 C.F.R. §104.4(b)(1).

[4] For purposes of §504, a protected "individual with handicaps" is one "who i) has a physical or mental impairment which substantially limits one or more major life activities; ii) has a record of such impairment; or iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(b); 34 C.F.R. §104.3(j)(1). "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the neurological, musculoskeletal, sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine systems, as well as any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 C.F.R. §104.3(j)(2)(i). "Major life activities" means activities such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 34 C.F.R. §104.3(j)(2)(ii).

C. **Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.***

1. Public entities that operate preschool or other programs may not, on the basis of disability, exclude or otherwise discriminate against qualified 3-to-5 year olds with disabilities. 42 U.S.C. §12132.[5]

2. The discriminatory practices barred as a §504 matter by 34 C.F.R. §104.4(b) are also barred by the regulations implementing the ADA. See 56 Fed. Reg. 35718 (July 26, 1991), regulations to be codified as 28 C.F.R. §35.130(b). In addition, preschool children with disabilities are protected by ADA regulations requiring a public entity to "make reasonable modifications in policies, practices, or procedures when...necessary to avoid discrimination on the basis of disability, unless...[it] can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity," *id.*, to be codified as 28 C.F.R. §35.130(b)(7), and prohibiting the use of eligibility criteria "that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered." *Id.*, to be codified as 28 C.F.R. §35.130(b)(8).

II. Transition from Early Intervention Services for Infants and Toddlers (Birth through Two) Under Part H of IDEA to Free Appropriate Public Education Under Part B

A. Transition from Part H to Part B is not automatic. Not all children receiving early intervention services will necessarily require special education and related services, or have a disability that triggers Part B eligibility.

B. State plans under Part B must include policies and procedures for insuring a smooth transition for children participating in early intervention programs under Part H, including a method of ensuring that when a child in need of special education and related services turns three, an IEP [or, consistent with 20 U.S.C. §1414(a)(5), an IFSP] has been developed and is being implemented. 20 U.S.C. §1413(a)(15), as added by §5 of Pub. L. 102-119.

C. State applications under Part H must contain a description of policies and procedures that will be used to ensure a smooth transition, including a description of how families will be included in transition planning and how the lead agency under Part H will coordinate with the local school district to confer, review program options, and establish a transition plan. 20 U.S.C. §1478(a)(8), as added by §15 of Pub. L. 102-119.[6]

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[5] Public entities include any state or local government, any department, agency, special purpose district, or other instrumentality of a state or states or local government. 42 U.S.C. §12131(1).

[6] The Department of Education published proposed regulations implementing this and other P.L. 102-119 requirements on May 1, 1992. See 57 Fed. Reg. 18986.

D. *If the family approves*, the Part H lead agency must convene a conference between the lead agency, the family, and the responsible school district at least 90 days before the child will become eligible for preschool services under Part B. 20 U.S.C. §1478(a)(8), as added by §15 of Pub. L. 102-119.

E. The early intervention agency (or provider) and the school system may not exchange personally identifiable information about a child unless the parent, after receiving written notice, provides written consent. See 20 U.S.C. §1480(2), as amended by §7 of Pub. L. 102-119.[7]

F. A state may use Part H early intervention money to provide a free appropriate public education to children from their third birthday to the start of the following school year. 20 U.S.C. §1479(3), as added by §16 of Pub. L. 102-119.

G. At its discretion, a *state* may use up to 20% of its Part B preschool grant to provide a free appropriate public education to 2-year-olds who will turn 3 during the school year, regardless of whether they have been receiving early intervention services under Part H. 20 U.S.C. §1419(c)(2)(B), as amended by §7(3) of Pub. L. 102-119.

H. A *school system* may use Part B funds to provide a free appropriate public education to 2-year-olds who will turn 3 during the school year if consistent with state policy. 20 U.S.C. §1419(f), as amended by §7(4) of Pub. L. 102-119.

III. "Appropriateness" for 3-to-5 Year Olds

A. Key Problems

1. IDEA does not set standards for preschool education, requiring only that 3-to-5 year olds, like older children with disabilities, receive a "free appropriate public education."

2. Many states lack regulations or other standards regarding the substance, frequency and duration of programming and services for 3-to-5 year olds with disabilities. Wide variations in the kind and quality of programming can result, with children in poorer school districts more likely to receive less service.

3. Many states that do have standards have set very low floors for frequency and/or intensity of services.

4. Where public preschool programs are not provided for students without disabilities, there is nothing with which to compare the quality of preschool programming offered children with disabilities. This makes it more difficult to use antidiscrimination statutes like §504 and the ADA to challenge inadequate programs and services as discriminatory, as has been successfully done with §504 on behalf of older children.

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[7] For an extensive discussion of confidentiality issues under Part H, including transition issues, see Kathleen B. Boundy, "Protecting Parents' Right to Privacy: The Significance of Consent and Confidentiality in the Provision of Early Intervention Services," Center for Law and Education (1992).

B. Key Legal Standards

1. As defined by IDEA, a "free appropriate public education" consists of special education and related services that, among other things, "include *an appropriate preschool...education* in the state involved." 20 U.S.C. §1401(a)(18)(C) (emphasis added).

2. Special education and related services must be tailored to meet the unique needs of each individual child. 20 U.S.C. §§1401(a)(16), (17). A policy or practice that places limits on the nature, duration or frequency of instruction or related services for 3-to-5 year olds despite individual need violates this requirement, as would one that made distinctions on the basis of disability type. *See Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983), *modified in part*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228 (1985) (decisions regarding whether extended school year programming will be provided must be made on case-by-case basis in view of individual needs); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983) (same); *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) (same).

3. Absent higher state standards, the education and related services provided must be sufficient to allow meaningful educational progress in light of the child's potential. See, e.g. *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1391 (1991); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184-85 (3rd Cir.), *cert. denied*, 109 S.Ct. 838 (1988).

4. States and school systems have an affirmative obligation to keep abreast of promising new methods and strategies for meeting the educational needs of children with disabilities, and to employ them in designing IEPs. *Timothy W. v. Rochester School District*, 875 F.2d 954, 973 (1st Cir.), *cert. denied*, 110 S.Ct. 519 (1989); see also 20 U.S.C. §1413(a)(3)(B); 34 C.F.R. §300.385. Decisions regarding kind, duration and frequency of programming for 3-to-5 year olds thus must be made in light of state of the art knowledge regarding child development and effective programs for this age group.

5. Where preschool programs are offered to nondisabled children, regulations implementing §504 and the ADA require that the programs and services provided to children with disabilities be comparable and equally effective in meeting their needs. See 34 C.F.R. §104.4(b)(1)(ii)-(iv) (regarding §504); 56 Fed. Reg. 35718, regulations to be codified as 28 C.F.R. §35.130(b)(1)(ii)-(iv) (regarding ADA).

6. It is impermissible to provide different aid, benefits or services to any class of individuals with disabilities unless such action is necessary to provide qualified individuals with disabilities with aid, benefits or services that are as effective as those provided to others. 34 C.F.R. §104.4(b)(1)(iv) (regarding §504); 56 Fed. Reg. 35718, regulation to be codified as 28 C.F.R. §35.130(b)(1)(iv) (regarding ADA). These regulations might be used, for example, to challenge the provision of certain related services only to children with certain disabilities, or a policy or practice that provided more hours/week of programming to students with a particular kind of disability than to others.

IV. Least Restrictive Environment for 3-to-5 Year Olds

A. IDEA

1. Children with disabilities are entitled to be educated with nondisabled students to the maximum extent appropriate in view of their individual needs; special classes, separate schooling or other removal from the mainstream education environment is only permissible when education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1415(5)(B); 34 C.F.R. §300.550(b). This requirement applies to *all* preschool children with disabilities, regardless of whether or not their state or school system provides preschool education for nondisabled children. See comment to 34 C.F.R. §300.552.

2. States and school systems must have available a continuum of alternative placements to meet the needs of children with disabilities, including instruction in regular classes and supplementary services to be provided in conjunction with regular class placements. 34 C.F.R. §300.551. This requirement, too, applies to preschool children and programs. See comment to 34 C.F.R. §300.552.

3. A system that does not operate preschool programs for nondisabled children must use other kinds of placements to ensure that each 3-to-5 year old with disabilities is placed in the most integrated setting consistent with his or her unique needs. Depending upon the needs of the child, these may include, for instance, placement in preschool programs operated by other community organizations or public agencies, such as Head Start, or in private preschool programs. See generally N. Treusch, OSEP Policy Memorandum 89-23, August 1, 1989, reprinted in 1 ECLPR ¶105; see also *Inquiry of Neveldine*, 1 ECLPR ¶63 (OSEP 1/9/90); see also comment to 34 C.F.R. §300.552.[8] Children who meet the eligibility criteria for the federal Chapter 1 compensatory education program may be placed in Chapter 1 preschool programs. It may also be possible for school systems to create preschool programs funded jointly by Chapter 1 and IDEA monies.[9]

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[8] The Eighth Circuit has stated that IDEA does not require school systems to create public preschool programs for nondisabled children into which children with disabilities can be integrated. See Mark A. v. Grant Wood Area Education Agency, 795 F.2d 52, 54 (8th Cir. 1986).

[9] Chapter 1 supports compensatory programs for "educationally deprived students." 20 U.S.C. §2724(a)(1). Chapter 1 funds are distributed to local school districts based upon the number of low-income children they serve. See 20 U.S.C. §§2711-2712. Although school districts most commonly use Chapter 1 funds for remedial reading and math programs at the elementary level, they can also be used for preschool programs. See 20 U.S.C. §2721(a)(2). The Department of Education has been encouraging this use. Children with disabilities may participate in Chapter 1 programs if they have needs stemming from educational deprivation rather than needs stemming solely from a disability. 34 C.F.R. §200.31(c)(5)(i). Chapter 1 funds cannot be used to provide services "that are required by Federal, State or local law to overcome children's handicapping conditions." 34 C.F.R. §200.31(c)(5)(iii).

For two recent Department of Education policy statements on the use of Chapter 1 preschool programs as placements for preschool children with disabilities, see Response of Mary Jean LeTendre, Director of Compensatory Education Programs, to June 12, 1991 Inquiry of Deborah Rose, 18 IDELR [Individuals with Disabilities Education Law Report] 150 (1991), and Response of Mary Jean LeTendre,

4. In school systems that operate preschool programs for children without disabilities, 3-to-5 year olds with disabilities must be placed in the schools they would attend if they did not have disabilities, unless implementation of the IEP requires some other arrangement. 34 C.F.R. §300.552(c).

B. Section 504

1. A school system that operates regular education preschool must place children with disabilities in its regular education environment unless education there cannot be achieved satisfactorily even with supplementary aids and services. 34 C.F.R. §104.34(a). School systems must also ensure that children with disabilities participate in nonacademic and extracurricular activities, including meals and recess, with nondisabled peers to the maximum extent appropriate to their individual needs. 34 C.F.R. §104.34(b).[10]

2. Children in school systems that operate preschool programs for nondisabled children should also be protected against inappropriate removal from the mainstream by the §504 regulations that make it illegal to "[d]eny a qualified handicapped person the opportunity to participate in or benefit from...[an] aid, benefit or service," 34 C.F.R. §104.4(b)(1)(i), or "[p]rovide different or separate aid, benefits or services to handicapped persons...unless...necessary to provide...aid, benefits or services that are as effective as those provided to others." 34 C.F.R. §104.4(b)(1)(iv).

C. ADA

1. Where school systems or other public entities operate programs for nondisabled preschoolers, children with disabilities will be protected against inappropriate exclusion from the mainstream by the ADA analogues of 34 C.F.R. §§104.4(b)(1)(i), (iv), to be codified as 28 C.F.R. §§35.130((b)(1)(i), (iv). See 56 Fed. Reg. 35718.

2. School systems and other public entities may also be required by 28 C.F.R. §35.130(b)(7), discussed above, to make reasonable modifications in policies, practices or procedures necessary for the inclusion of children with disabilities in preschool programs. 28 C.F.R. §35.130(b)(8), also discussed above, may preclude them from using certain eligibility criteria that thwart inclusion.

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Director of Compensatory Education Programs, to July 24, 1991 Inquiry of Deborah Rose, 18 IDELR 152 (9/3/91). Additional information about Chapter 1 is available from the Center for Law and Education.

[10] Unlike the regulations regarding rights to appropriate education, related services, transportation, residential placement (34 C.F.R. §104.33), evaluation and placement rights and procedures (34 C.F.R. §104.35) and procedural safeguards (34 C.F.R. §104.36), §104.34 is *not* on its face limited to recipients that operate public elementary and secondary programs. Sections 104.34 begins, "[a] recipient to which this subpart [Subpart D] applies shall..." Pursuant to 34 C.F.R. §104.31, Subpart D applies to preschool, elementary, secondary and adult education programs.